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POWERS OF THE BANKRUPTCY COURT BETWEEN THE FILING OF THE PETITION AND THE ADJUDICATION AS TO THE PROPERTY OF THE BANKRUPT.—There is great conflict among the cases in the lower federal courts as to the measure of control that the bankruptcy court may exercise over the property of the bankrupt, or property that was his prior to the filing of the petition, during the period intervening between the filing of the petition and the adjudication. The question seems never to have been directly passed on by the Supreme Court. Of course, the bankruptcy court has no power over the property of a debtor before a petition is filed, even though the debtor may have committed an act of bankruptcy And after an adjudication the powers of the bankruptcy court seem to be well defined, though there is some conflict.

It is settled that after adjudication the bankruptcy court may in a summary proceeding determine all claims as to property in its custody.[1] And, on the other hand, if the property is in the possession of an adverse claimant the question as to title can be determined only in a plenary action.[2] If a debtor is adjudged a

[1] Bryan *v.* Bernheimer, 181 U. S. 188, 5 A. B. R. 623. See REMINGTON, BANKRUPTCY, § 1796, 1811.

[2] Louisville Trust Co. *v.* Comingor, 184 U. S. 18, 7 A. B. R. 421. Prior to 1903, plenary actions were maintainable only in the state courts. Bardes *v.* Hawardeen Bank, 178 U. S. 524, 4 A. B. R. 163. But the amendment of 1903 to § 23b of the Bankruptcy Act gives the bankruptcy court concurrent jurisdiction with the state courts over plenary actions instituted by the trustee under §§ 60b, 67e, and 70e. Cases involving the plenary jurisdiction of the bankruptcy court should be dis-

bankrupt, the bankruptcy court at that time obtains legal custody of all the property of the bankrupt that is in his, or his agent's possession, or that is in the hands of one who is not claiming title or the right to possession.[3] And if the claim to title or possession is merely colorable or without right, the one in possession is not an adverse claimant.[4] Thus, an agent in possession, who refuses to surrender the property, is not an adverse claimant.[5] And, one having possession under a receivership or general assignment under state law, which has been nullified by the adjudication in bankruptcy is not an adverse claimant, since his right to title or possession is void.[6]

But it is not so clear as to the powers of the bankruptcy court between petition and adjudication. It is clear, as to property in the possession of the bankrupt, or even property in the hands of a third person, that the court may issue restraining orders, prohibiting the transfer of the property.[7] But, has the bankruptcy court the power to take the property from the possession of the bankrupt or a third person? Section 2 (3) of the Bankruptcy Act gives the bankruptcy court the power "to appoint receivers or the marshals, upon the application of parties in interest, in case the court shall find it absolutely necessary, for the preservation of the estate, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified." Section 69 is as follows: "A judge may, upon satisfactory proof, by affidavit, that a bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, or has neglected or is neglecting, or is about to so neglect his property that it has thereby deteriorated or is thereby deteriorating or is about thereby to deteriorate in value, issue a warrant to the marshal to seize and hold it subject to further orders. * * *." It is clear that these sections give the court the power to seize the property of the bankrupt in his possession in certain cases. It does not seem, however, that the power is conferred upon the bankruptcy court to seize property not in the possession of the bankrupt, but that is in the hands of one claiming title or possession under a lien, transfer, or assignment which to all intents and purposes is valid, since there has, as yet, been no adjudication nullifying it.[8] For, it is settled beyond dispute that it is not the filing of the petition which nullifies liens, transfers and assign-

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tinguished from cases involving the summary jurisdiction of the bankruptcy court. The amendment of 1903 did not enlarge the summary jurisdiction.

[3] White *v.* Schloerb, 178 U. S. 542, 4 A. B. R. 178; Mueller *v.* Nugent, 184 U. S. 1, 7 A. B. R. 224.

[4] Whitney *v.* Wenman, 198 U. S. 539, 14 A. B. R. 45.

[5] Mueller *v.* Nugent, *supra.*

[6] Bryan *v.* Bernheimer, *supra;* REMINGTON, BANKRUPTCY, § 1611.

[7] In re Gutwillig, 92 Fed. 337, 34 C. C. A. 377, 1 A. B. R. 388; Davis *v.* Bohle, 92 Fed. 325, 34 C. C. A. 372, 1 A. B. R. 412.

[8] In re Rockwood, 91 Fed. 363, 1 A. B. R. 272.

ments, but these are nullified only in the event that adjudication follows, and it is the adjudication which nullifies them.[9]

The exercise of this power over the property, formerly belonging to the bankrupt but which is now in the possession of an adverse claimant, has been justified in cases of general assignments for the benefit of creditors, not on the ground that the bankruptcy court has such power, but rather on the ground of expediency. Since the decision in *West Co.* v. *Lea* [10] it is settled that solvency is no defense where the debtor has made a general assignment for the benefit of creditors, and, therefore, an adjudication in bankruptcy will follow in nearly every case. It is argued that since the debtor's estate will ultimately be administered by the bankruptcy court, it is much better to have the estate administered from the outset by the officers of the bankruptcy court, who are especially fitted by their experience to do this, and thus there will be no loss of time in the running of the bankrupt's business and it will be unnecessary to issue restraining orders upon the assignee.

In the recent case of *In re D. & E. Dress Co.,* 244 Fed. 885, 40 A. B. R. 360, a debtor made a general assignment under state law for the benefit of his creditors. A petition was filed against him within four months, and before adjudication a motion was made in the bankruptcy court to remove summarily the assignee and to appoint a receiver to take possession of the goods. The assignee was of high character and there was no showing that the appointment of a receiver was absolutely necessary. The court granted the motion. The court followed the above reasoning, and placed the decision on the additional ground that it desired to break up the very prevalent practice of debtors making general assignments.[11]

The principal case seems to be unsound, both on reason and authority.[12] The Supreme Court has repeatedly held that general

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[9] In re Andre, 135 Fed. 736, 68 C. C. A. 374, 13 A. B. R. 132; In re Carver, 113 Fed. 128, 7 A. B. R. 539; In re Romanow, 92 Fed. 510, 1 A. B. R. 461. See REMINGTON, BANKRUPTCY, § 1461.

[10] 174 U. S. 590, 2 A. B. R. 463.

[11] This ground seems to be without any foundation at all, since a debtor is under no legal duty to go into bankruptcy. In re Chase, 124 Fed. 753, 59 C. C. A. 629, 10 A. B. R. 677. Nor does it seem that the power to appoint a receiver could be exercised unless it was absolutely necessary.

[12] In re Fish Bros. Wagon Co., 164 Fed. 553, 90 C. C. A. 427, 21 A. B. R. 149; In re Oakland Lumber Co., 174 Fed. 634, 98 C. C. A. 388, 23 A. B. R. 181; Morning Tel. Pub. Co. *v.* Hutchinson Co., 146 Mich. 38, 109 N. W. 42, 8 L. R. A. (N. S.) 1232, 17 A. B. R. 425; In re Andre, *supra;* In re Rathman, 183 Fed. 913, 106 C. C. A. 253, 25 A. B. R. 246; In re Laplume Milk Co., 145 Fed. 1013, 16 A. B. R. 729; In re Rockwood, *supra.* However, there are a number of cases which hold as does the principal case. In re Federal Mail & Express Co., 233 Fed. 691, 37 A. B. R. 240; In re Kleinhans, 113 Fed. 107, 7 A. B. R. 604; Whittlesey *v.* Becker & Co., 142 App. Div. 313, 126 N. Y. Supp. 1046, 25 A. B. R. 672; In re Rochford, 124 Fed. 182, 59 C. C. A. 388, 10 A. B. R. 608;

assignments are not void, or fraudulent, nor are they opposed to the policy of the Bankruptcy Act.[13] They may be avoided only by the adjudication of the debtor upon a petition against him filed within four months after the assignment. Since they are not void, but voidable only when bankruptcy intervenes, they are valid for all purposes, unless an adjudication in bankruptcy follows.[14] After the adjudication the holding of the assignee is not adverse, since the claim by which he holds has been nullified. But until there has been an adjudication, the deed of assignment is perfectly good, and the assignee is an adverse claimant in possession. It is difficult to see where the bankruptcy court derives its power to take the property out of the assignee's possession, before it has been decided that the deed of assignment is void. As was said by the court in the case of *In re Oakland Lumber Co.*:[15]

> "Cases have not infrequently come within the observation of the court where after a receiver was appointed the petitioning creditors were unable to establish their own status or to prove an act of bankruptcy and the petition was dismissed, leaving the court with a receiver on its hands with no proceeding in esse and no funds with which to pay him and the expenses incurred by him."

In the case of *In re Rockwood*,[16] a marshal of the bankruptcy court was ordered to seize property in the possession of a third person who claimed title thereto, before there had been an adjudication. The court said, "It cannot be judicially known at the present time whether Rockwood will or will not be adjudged a bankrupt, and, unless he is so adjudged, there is no ground for attacking the possession of the property now held by the mortgagee."

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[14] Randolph *v.* Scruggs, *supra;* In re Chase, *supra;* In re Fish Bros. Wagon Co., *supra;* Summers *v.* Abbot, 122 Fed. 36, 58 C. C. A. 352, 10 A. B. R. 254.

In re Moody, 131 Fed. 525, 12 A. B. R. 718; In re Knopf, 144 Fed. 245, 17 A. B. R. 48; Davis *v.* Bohle, *supra;* In re Etheridge Furniture Co., 92 Fed. 329, 1 A. B. R. 112; Horner-Gaylord Co. *v.* Miller, 147 Fed. 295, 17 A. B. R. 257. But almost all of these cases seem to be based on a misconception of the cases of Bardes *v.* Hawardeen Bank, *supra,* and Bryan *v.* Bernheimer, *supra.* In the former case there was a dictum to the effect that § 2 (3) and § 69 did not authorize the forcible seizure of property in the possession of an adverse claimant. The case of Bryan *v.* Bernheimer repudiated this dictum. But since, in the latter case, the seizure of the property in the possession of the adverse claimant was after adjudication, and hence after the holding under the general assignment had been rendered void, it would seem that the dictum was repudiated only in so far as it applied after adjudication. There does not seem to be any ground for the distinction made by Collier (Bankruptcy, 10 ed., p. 40) between the right to take possession of the goods summarily and the right to decide the merits of the claim summarily.

[13] Boese *v.* King, 108 U. S. 379; Reed *v.* McIntyre, 98 U. S. 507; Randolph *v.* Scruggs, 190 U. S. 533, 10 A. B. R. 1.

[15] *Supra.* [16] *Supra.*

No doubt the holding in the principal case would be justifiable, were considerations of business and expediency alone allowed to govern, and it might be wise to amend the Act to expressly so provide, but it is difficult to see how the exercise of such power is justified under the present language of the Act and the decisions of the courts.

It would seem that the same considerations should apply to receiverships under state law. For, though it is settled that all state bankruptcy laws are suspended upon the adoption of a national bankruptcy act, yet state laws providing for receiverships do not always amount to bankruptcy acts, and hence are not suspended by the National Bankruptcy Act.[17] But upon an adjudication in bankruptcy, the title of the state court receiver is nullified, and the bankruptcy court may secure the possession of the debtor's property by obtaining an order from the state court on the receiver to surrender the property.[18] This case and the case of general assignments constitute one of the exceptions to the rule of comity that the court which first obtains jurisdiction retains it throughout. But the receivership is not nullified by the filing of the petition, but by the adjudication, hence it would seem that the bankruptcy court could not remove the receiver before adjudication. And furthermore, since the bankruptcy courts are extremely careful to observe the rules of comity between themselves and the state courts, in doubtful cases the jurisdiction of the state courts would probably be upheld. And this must *a fortiori* be true, when the state officer is acting under a valid state law, whereas the bankruptcy court is not acting under the Bankruptcy Act, since the essential fact to give it jurisdiction—the adjudication—has not yet occurred.

RAISED CHECKS.—The rule that a written instrument is invalidated by any material alteration without the consent of the party sought to be charged thereon is now universally recognized and applies to all written instruments. The rule seems to have originated in the old common law applicable to deeds. Since the deed itself was considered to be the contract of the parties and could not be contradicted by parol evidence, and since any unauthorized alteration of it destroyed the only evidence of the real agreement of the parties, such an alteration was held to invalidate the deed altogether.[1] Then this principle was extended to bills of exchange, and finally to all written instruments[2] This rule is based upon the principle that such an alteration changes the contract of

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[17] In re Watts, 190 U. S. 1, 10 A. B. R. 113; State ex rel. Strohl *v.* Superior Court, 20 Wash. 545, 56 Pac. 35, 45 L. R. A. 177.

[18] REMINGTON, BANKRUPTCY, §§ 1609, 1611.

[1] Henry Pigot's Case, 11 Co. Rep. 27.

[2] Angle *v.* Northwestern Ins. Co., 92 U. S. 330; Davidson *v.* Cooper, 11 M. & W. 778; Master *v.* Miller, 4 T. R. 320.